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## THE OFFER OF AN ACT FOR A PROMISE

The term "unilateral contract" is frequently used in an undesirable sense to mean that there is no contract at all, either because there has been no acceptance of the offer or because there is no consideration for the promise to be enforced.<sup>1</sup> It should be used only where the agreement of the two parties has created a single duty and not mutual duties, with a single correlative right in the opposite party and not mutual rights. The term has been subjected to some criticism,<sup>2</sup> a criticism that is mainly due to a failure to distinguish between physical facts and the jural relations of persons caused by such facts. There cannot be "unilateral twins" sagely remarks Mr. Ewart, not observ-

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<sup>1</sup> *Morrow v. Southern Ex. Co.* (1897) 101 Ga. 810, 28 S. E. 998; *Ziehm v. Frank Steil B. Co.* (1917) 131 Md. 582, 102 Atl. 1005; *Meade v. Poppenberg* (1915) 167 App. Div. 411, 153 N. Y. Supp. 182. See Corbin, *Offer and Acceptance and Some of the Resulting Legal Relations* (1917) 26 YALE LAW JOURNAL, 173; 1 Williston, *Contracts* (1920) sec. 13.

<sup>2</sup> See the review of Anson on *Contract* (Am. ed. by Corbin, 1919) in 33 HARV. L. REV. 626.

ing that where twins exist as a fact it is quite possible for twin A to be under a duty to twin B in the absence of any duty whatever on the part of twin B to twin A.

The single duty existing in the case of a unilateral contract may rest either upon the offeree or upon the offeror, the correlative right being of course in the opposite party. In other words, the offer may confer a power on the offeree to create, by his subsequent voluntary act, either a duty on himself or a duty on the offeror. The latter is far the more frequent.<sup>3</sup>

Of the former Professor Williston says:<sup>4</sup> "Even when the offeror in terms offers an act of his own in exchange for a promise to be made by the offeree, the words of the offer are necessarily promissory, for the offeror must in the nature of the case, announce that he will do a certain act in the future, in return for a promise to be made to him. Indeed an offer which requests from the offeree a promise will, when accepted, always ripen into a bilateral rather than a unilateral contract, except in one narrow class of cases; namely, where the very giving of the promise by the offeree also has the effect of completing the act promised by the offeror. The only instance of this sort that can be supposed arises where the offeror offers (that is, promises) to transfer title to personal property on receiving a specified promise from the offeree."

This language is open to objection. It is inaccurate to say that "the offeror must, in the nature of the case, announce that he will do a certain act in the future";<sup>5</sup> for, as the author himself says in the next sentence, in some cases "the very giving of the promise by the offeree also has the effect of completing the act promised by the offeror." This makes it perfectly clear that the only *act* left to be done is the act of the offeree. In such case there is in fact no promise of any sort by the offeror, no "undertaking to do something in the future."<sup>6</sup> An offer of title to personal property in return for a promise by the offeree is not a "promise to transfer." It creates not a duty in the offeror but a power in the offeree. The only operative act still to take place is an act of the offeree, the making of the requested promise.<sup>7</sup> After making his offer, the offeror may go peacefully to sleep, confident that title to his chattel will pass to the offeree upon the latter's acceptance.<sup>8</sup>

<sup>3</sup> See illustrations given in (1917) 26 YALE LAW JOURNAL, 173.

<sup>4</sup> 1 Williston, *op. cit.*, sec. 25.

<sup>5</sup> It is not safe to trust to the "nature of the case." This often means, as here, that the writer has chosen his own major premise and then assumes that it is infallibly and exclusively the true one. The assumption may here be due to the author's having defined a contract as "a promise or set of promises." *Ibid.*, sec. 1.

<sup>6</sup> 1 Williston, *op. cit.*, sec. 24.

<sup>7</sup> See *Mactier v. Frith* (1830, N. Y.) 6 Wend. 103; Y. B. 17 Edw. 4, 2.

<sup>8</sup> It seems not improbable that the courts will in the future hold acceptance

That the illustration in the passage quoted above is not the "only instance of this sort" may be observed from a study of *Suter v. Farmers' Fertilizer Company* (1919, Ohio) 126 N. E. 304. The plaintiff was a broker who had negotiated with the Aetna Explosives Company on behalf of the defendant, the result of the negotiation being that the defendant contracted with the Aetna Company to supply it with six hundred tons of sulphuric acid per month for twelve months at twenty-seven dollars per ton, specifically promising the Aetna Company in that contract to pay Suter, the broker, a commission of one per cent, "said brokerage to be paid as payments of the price were received by the defendant." After a few small deliveries had been made, on which the commission was paid to the plaintiff, the Aetna Company got into financial difficulties; it agreed with the defendant to rescind the contract for acid and paid to the defendant the sum of \$45,000 as consideration. The court held that the defendant was bound to pay the plaintiff the agreed commission on the agreed purchase price of the entire amount of acid and not merely on the \$45,000 received.

In this case the defendant denied that it had ever employed the plaintiff as broker, although there was some evidence to the contrary. The court rightly found it unnecessary to determine this question, for the plaintiff had in fact offered his services to the defendant, for pay, the latter had already received the benefit of these services in that a willing buyer was now at hand, and he now expressly promised a third party to pay for them. The contract thus made was unilateral, the services of the plaintiff being fully performed prior to the making of the express promise by the defendant. No duty ever rested on the plaintiff, but a duty to pay now rests on the defendant.<sup>9</sup> This case therefore clearly suggests the possibility of an offer of executed service for a return promise. A broker may without request on the part of the principal find and bring him a willing

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to be operative, even though the offeror is *dead* and no longer capable of acting. See German Civil Code, sec. 153.

<sup>9</sup> It is not within the scope of this comment; but the court seems to be quite right in holding that the defendant's agreed duty was to pay one per cent on the full contract price, and that the express condition precedent of payment by the Aetna Company was nullified by the fact that the defendant, by voluntary rescission, itself prevented the fulfillment of the condition. The defendant does not allege that the Aetna Company was insolvent. One cannot escape a duty by voluntarily preventing the fulfillment of a condition precedent to such duty by a third party; and such prevention does not cease to be *voluntary* merely because it seems that sound business policy requires it. See *Camden v. Jarrett* (1907) 83 C. C. A. 492, 154 Fed. 788; *Brackett v. Knowlton* (1912) 109 Me. 43, 82 Atl. 436; *Loehr v. Dickson* (1910) 141 Wis. 332, 124 N. W. 293; *Rumsey v. Livers* (1910) 112 Md. 546, 77 Atl. 295; *Weinberg v. Shulman* (1913) 53 Pa. Sup. Ct. 64; *Dupont Powder Co. v. Schlottman* (1914, C. C. A. 2d) 218 Fed. 353; *Colvin v. Post Mtge. & Land Co.* (1919) 225 N. Y. 510, 122 N. E. 454.

and able purchaser, informing the principal that he will expect a commission if a sale is made. The broker's work is then all done and he makes no promise. No doubt the principal can then make a sale to the purchaser introduced by the broker without binding himself to pay a commission. This is because the services have been thrust upon him; he is privileged not to accept the offer and he is not disabled from making a sale without accepting the offer.<sup>10</sup> But the point is that he has the power to accept the offer and to bind himself, this power to be exercised by making the sale and by expressing assent to the broker's proposal. In the case cited this is exactly what the defendant did.<sup>11</sup>

The case is not substantially different where the broker has rendered his service at the request of one who assumed without authority to act as the agent of the principal, although in holding the principal bound by his acceptance of the services the courts will now use the language of agency; they will speak of his being bound by "ratification." But this ratification is identical with the acceptance of an offer; and on such ratification, the resulting contract is unilateral exactly as above. The broker has made no promise and his services are all done before the principal makes any promise. This may be a case of past consideration; but if so we must make the best of it.

With respect to consideration these cases must be distinguished from the offer of a conveyance of property in return for a promise, referred to above. In neither case does the offeror make a promise or offer to undertake a duty. In both cases the offeror confers a power upon the offeree. But in the property case the exercise of the power by the offeree, the acceptance, will be detrimental to the offeror and beneficial to the offeree, since it is the final operative act effecting the conveyance of the property. This detriment and benefit are contemporaneous with the making of the offeree's promise, and so it may be argued that the consideration is not past, even though the acts of the offeror are all long since past. In the present case the exercise of the power by the offeree is not detrimental to the offeror (the promisee) or beneficial to the offeree (the promisor). By the act of acceptance nothing is taken from the promisee or given to the

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<sup>10</sup> *Walton v. Clark* (1893) 54 Minn. 341, 56 N. W. 40; *McVickar v. Roche* (1902) 74 App. Div. 397, 77 N. Y. Supp. 501; *Ballentine v. Mercer* (1908) 130 Mo. App. 605, 109 S. W. 1037.

<sup>11</sup> That the same decision *might have been* reached on some different ground is obvious, but the decision should be supported as it stands. See in accord: *Edson v. Poppe* (1910) 24 S. D. 466, 124 N. W. 441; *Muir v. Kane* (1909) 55 Wash. 131, 104 Pac. 153; *Spencer v. Potter* (1911) 85 Vt. 1, 80 Atl. 821; *Boothe v. Fitzpatrick* (1864) 36 Vt. 681; *Ferguson v. Harris* (1893) 39 S. C. 323, 17 S. E. 782; *Anderson v. Best* (1896) 176 Pa. 498, 35 Atl. 194. Contra: *Sharp v. Hoopes* (1906) 74 N. J. L. 191, 64 Atl. 989; *Bagnole v. Madden* (1908) 76 N. J. L. 255, 69 Atl. 967; *Wulff v. Lindsay* (1903) 8 Ariz. 168, 71 Pac. 963. See also notes in 53 L. R. A. 373, 26 L. R. A. (N. S.) 526.

promisor. The only new legal relations created by acceptance are a duty in the promisor and its correlative right in the promisee. These are in every respect beneficial to the latter. The only possible consideration for the promise, therefore, is the past action of the offeror (promisee). This action was indeed detrimental to him and beneficial to the offeree (promisor), but it lies in the past and at the time it occurred it created no right or duty either contractual or quasi-contractual.

The fact that the promisee has conferred an actual financial benefit on the promisor may well be regarded as a sufficient cause or reason for the enforcement of the express promise. The sale itself is not being forced upon the promisor, and the existence of the definite financial benefit takes the case out of the limbo of mere uncertain ethical opinion. No doubt decisions of this kind rest upon some moral obligation theory. So do all other past consideration cases. They do not rest upon any theory of quasi-contract, for the reason that the express promise of the defendant is held to be a necessary operative fact determining the amount of the recovery. The judgment is for the amount promised, not the amount of the value received and unjustly retained by the defendant.<sup>12</sup>

The doctrine that a moral obligation is a sufficient consideration is supposed to have been "exploded," but within limits it is far from dead. The doctrine of consideration itself rests upon moral obligation in a broad sense. It rests upon the *mores* of society—those approved rules, customs, and ideas that are generally believed to make for general welfare. In individual disputes the doctrine becomes a test of what the *mores* are and of the existence of social and moral obligation. But it must always be remembered that the *mores* determine the doctrine and that the doctrine does not control the *mores*. In no living and changing society can any legal rule or doctrine remain unchanged. It is only by giving the doctrine of consideration a continually new content that the doctrine itself can continue to live. It seems clear that in this way the doctrine of consideration is approaching the doctrine of *causa* in the Roman law.<sup>13</sup> Societal conditions in Roman and Continental life are not so different from those of England, America, and the English colonies as to prevent a similar development in law. It is the function of our courts to keep the doctrines up to date with the *mores* by continual restatement and by giving them a continually new content.<sup>14</sup> This is judicial legislation,

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<sup>12</sup> In *Wright v. Farmer's Bank* (1903) 31 Tex. Civ. App. 406, 72 S. W. 103, the plaintiff voluntarily paid the defendant's debt, and a later promise to pay was enforced. Here the amount is identical with the enrichment.

<sup>13</sup> See Lorenzen, *Causa and Consideration* (1919) 28 YALE LAW JOURNAL, 621.

<sup>14</sup> This shows the futility of codification as an attempt at final crystallization of the *mores*, though not as a means of careful and conservative legislation to do away with some doubts and conflicts.

and the judge legislates at his peril. Nevertheless, it is the necessity and duty of such legislation that gives to judicial office its highest honor; and no brave and honest judge shirks the duty or fears the peril.

A. L. C.

#### THE CORPORATE ENTITY AND INTERNATIONAL LAW

Two recent decisions of the British Privy Council, *The Kronprinzessin Cecilie (Part Cargo ex)* (1919, P. C.) 119 L. T. R. 457 and *The Hamborn* (1919, P. C.) 119 L. T. R. 463 illustrate the vicissitudes of the corporate entity theory in time of war. In the first case an American corporation, The Vacuum Oil Company, shipped a cargo of oil, f. o. b. on a German ship, to two of its subsidiary companies organized in Germany and Austria, practically all of whose stock was owned by the parent company in the United States. Notwithstanding this fact and an agreement by which the parent company undertook to bear any loss by reason of the failure of the goods to reach the subsidiary, the British prize court condemned the goods as "enemy owned." In the second case, a Dutch vessel flying the Dutch flag had been captured by a British cruiser on a voyage from New York to Cuba. It appeared that the vessel was owned by a Dutch company. The stock of this company was owned by two other Dutch companies, A and B. The stock in company A was in turn owned partly by B and partly by certain German companies, whose stockholders were Germans. The stock in company B was owned by German companies with German stockholders. The steamship was managed by two Germans resident in Holland, but the court found that the "control" of all the companies was exercised from Germany, and hence that the Dutch corporation owning the vessel was really "enemy." Thus, to achieve this result, three layers of corporate veil were stripped from the vessel to disclose the human beings whose economic interests as beneficial owners it was designed to reach.

In the Vacuum Oil case the real persons whose economic interests were affected were American citizens, but the condemnation was made in disregard of that fact because the consignee, though a subsidiary of an American corporation, had been organized in an enemy country.<sup>1</sup> In the *Hamborn* case, the vessel was owned by a neutral corporation, but the persons whose economic interests would be affected by the confiscation were Germans, encased in three coats of corporate formation. The conclusion would seem to follow that the prize court is no slave to any theory, corporate or other, but will confiscate property whenever belligerent interests seem to make it desirable and the

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<sup>1</sup> On a previous occasion, the State Department had extended its protection to the Vacuum Oil Co. of Austria against the Austrian government, because its stockholders were principally American citizens.

grounds of the decision can be sustained before neutrals as sufficiently plausible. While the large discretion thus exercisable has through many wars become in some degree hardened into rule, the dependence of the prize court on municipal legislation and the conceived exigencies of the recent war, which induced wide extensions of belligerent powers and corresponding restrictions on time-honored neutral rights, have made more evident than ever before the necessity for a general right of appeal from the decisions of prize courts to an international tribunal.<sup>2</sup>

The decisions under review suggest a possible interest in a brief survey of the treatment by belligerents, and particularly by their courts, of the corporate entity in time of war. For this purpose the determination of national character is, of course, the main object in view and its principal spheres of application involve the power to sue or to trade with the enemy, and the liability to condemnation or sequestration of corporate property at sea or on land.

It has often been observed that nationality and domicile, the ordinary tests of national character in time of war, can be applied to corporations in a metaphorical sense only.<sup>3</sup> Yet the necessity for impairing the economic interests of the enemy have led to the establishment of certain tests for the fatal connection between the corporation and the enemy territory or interests. If these tests display no consistent regard for any particular corporate theory, the explanation is to be found in belligerent necessity or self-interest and in the absence of any special rule of international law on the subject.

With respect to suit by "enemy" corporations in municipal courts, no special rules have been created by municipal legislation, except such as are contained in the Trading with the Enemy Acts, and these at the beginning of the war made incorporation under the law of an enemy country the test of enemy character.<sup>4</sup> Inasmuch as this was consistent with the Anglo-American criterion of corporate nationality, no difficulty was found in adhering to it, so that in the early years of the war British corporations were permitted to sue in British courts, regardless of the domicile or the nationality of their shareholders.<sup>5</sup> The principle was carried to its logical conclusion in the decision of the Court of Appeal in the *Daimler* case<sup>6</sup> in which five out of six judges considered that a British company, all but one of whose twenty-five thousand shares were held in Germany, should be permitted to sue in a British court as a friendly corporation. That startling

<sup>2</sup> See (1919) 28 YALE LAW JOURNAL, 583.

<sup>3</sup> See (1918) 27 *ibid.*, 108.

<sup>4</sup> This was applied in the Boer War to a Transvaal company with a majority of British stockholders. *Janson v. Driefontein Cons. Mines, Ltd.* [1902] A. C. 484.

<sup>5</sup> *Amorduct Mfg. Co. v. Defries* (1915, C. A.) 31 Times L. R. 69.

<sup>6</sup> (C. A.) [1915] 1 K. B. 833.

result persuaded the House of Lords, on appeal, to conclude that the company could not sue, but they escaped an open departure from their traditional corporate entity theory by basing the decision on the discovery that the secretary had no authority to bring the action.<sup>7</sup> Only Lord Halsbury was willing to pierce the corporate veil and put the case squarely on the ground that the economic interest in the corporation was almost completely German and that it could be considered like a partnership. Lord Parker, however, not without dutiful tribute to the *prima facie* friendly character of the corporation, pronounced a *dictum* that such a British company will assume an "enemy" character if its agents or the persons *de facto* in control of its affairs are resident in an enemy country, or wherever resident, are adhering to the enemy, or taking instructions from or acting under the control of enemies.<sup>8</sup> "Control" seemed to him the primary test, rather than the nationality of the shareholders, and it seems that he conceived "control" to be vested in directors, rather than in their principals, the shareholders. That test of "control" became something of a fetish in subsequent cases, being applied to circumstances in which the power to communicate, essential to control, was entirely lacking.

As the war advanced in intensity and bitterness, more stringent tests of enemy character were fixed by statute and executive regulation. The case of the domestic corporation doing business in enemy territory, which for purposes of trading was declared to be an "enemy" by the British Trading with the Enemy Act, came up for determination in respect to the privilege of such a corporation to sue in British courts. In the case of such a company, principally with British shareholders, organized to acquire plantations in a Germany colony, the Court of Appeal held that its "enemy" character was confined to its

<sup>7</sup> (H. L.) [1916] 2 A. C. 307. Two of the eight Law Lords dissented.

<sup>8</sup> Justice Lehmann in *Fritz Schulz Jr. Co. v. Raimés* (1917, N. Y. Sup. Ct.) 100 Misc. 697, 166 N. Y. Supp. 567, followed Lord Parker's *dictum* by holding as friendly an American corporation the majority of whose stock was held in Germany, but three of whose four directors were resident in the United States, so that "control" was found not vested in alien enemies. See (1918) 27 YALE LAW JOURNAL, 108. The distinction here made between director's "control" and stockholder's "control" seems artificial, yet the conclusion carries out the legislative intent to permit American corporations, regardless of their stock ownership, to do business and sue in this country. See former Asst. Atty. Gen. Warren in Hearings before House Committee, quoted in (1919) 19 COL. L. REV. 121. Story, J., in *Society, etc. v. Wheeler* (1814, C. C. N. H.) 2 Gall. 105, which passed off on a question of pleading, stated that he would determine the character of the corporation from the character, enemy or friendly, of its members. In *Posselt v. D'Espard* (1917, N. J. Ch.) 100 Atl. 893, a German corporation was admitted as plaintiff, but on the ground of a conceived amelioration of its disabilities in the Presidential proclamation. It is well to note that Lord Parker's *dictum* excepted from the operation of the principle the question of property. *The Noordam* (No. 2) [1919] P. 255, 259.



trading privileges and not to its status as a plaintiff in court.<sup>9</sup> The American Trading with the Enemy Act, section 2, seems intentionally to have omitted from the classification of "alien enemy" the American corporation (not the individual) doing business in enemy territory. Trading with the branches of such a corporation anywhere would thus seem, but for measures of "blockade," to have been permissible.<sup>10</sup> As in England, the country of incorporation furnished the *prima facie* test of nationality.

In England, enemy character was by proclamation assigned also to corporations doing business in territory occupied by the enemy, so that Belgian corporations had to cease all business in Belgium to avoid the penalties of "enemy" character in England.<sup>11</sup>

The extensions of the criteria of corporate enemy character noted in the *Daimler* case had been anticipated by some of the British colonial proclamations. For example, in Australia, trading was forbidden, as "enemy," with any company "which the Attorney-General, by notice published in the *Gazette*, declares to be, in his opinion, managed or controlled, directly or indirectly, by or under the influence of, persons of enemy nationality, or resident or carrying on business in an enemy country."<sup>12</sup> When the blacklist was instituted in England, doubtless these were but a few of the tests of British displeasure by which corporations throughout the world incurred its penalties.

The absence, and possibly the uselessness, of any well-defined test for determining the national character of corporate property at sea is illustrated by the practice in the recent war. Unhampered by any recognized rule of international law, belligerents usually applied such a rule as would enable them to establish a plausible connection between the property or its owners, legal or beneficial, and the enemy territory or interests, deemed sufficient by them to justify confiscation. With respect to vessels, the owner is deemed bound by the flag adopted, but not so the captor. Thus, ships seized as prize, flying the German

<sup>9</sup> *In re Hilckes* (C. A.) [1917] 1 K. B. 48. See also *Nigel Gold Mining Co. v. Hoode* [1901] 2 K. B. 849, a British company with British stockholders, but doing business in the Transvaal.

<sup>10</sup> *Quære*, whether this renders obsolete the decision in *Juragua Iron Co. v. United States* (1908) 212 U. S. 297, 29 Sup. Ct. 385, in which, with respect to its property in Cuba, enemy territory, a Pennsylvania corporation was held to be an "enemy," subjecting such property to belligerent use by the American forces. For the purpose of the case, it was unnecessary to hold this an enemy company.

<sup>11</sup> See *Central Indian Mining Co. v. Société Coloniale* (1919, C. A.) 36 Times L. R. 88, and its reference to *Société d'Aljustrel v. Anglo-Belgian Agency, Ltd.* (C. A.) [1915] 2 Ch. 409.

<sup>12</sup> See *Welsbach Light Co. v. Commonwealth* (1916, H. C. of A.) 22 C. L. R. 268. The English Trading with the Enemy Amendment Act, 1916, laid down somewhat similar tests for inhibiting trade with or winding up of corporations, as did section 3 of the United States Trading with the Enemy Act.

flag were, of course, condemned, regardless of the fact that the stockholders, the beneficial owners, were citizens or neutrals.<sup>13</sup> Down to October 20, 1915, when the simple and practical rule of article 57 of the Declaration of London, by which the national character of a vessel was determined by the flag she was entitled to fly, was abrogated by Order in Council,<sup>14</sup> the neutral vessel was in theory exempt from capture. After that date, however, the neutral flag or even neutral corporate ownership did not prevent scrutiny of her actual beneficial ownership by enemy individuals.<sup>15</sup> Whether legal ownership of a neutral vessel by an enemy corporation with a majority of neutral stockholders would have subjected the vessel to condemnation has not been made clear.

The most interesting cases of piercing the corporate veil involved British vessels owned by British companies, the beneficial interest appearing to be vested in enemies. In the *St. Tudno*,<sup>16</sup> a British company, owning a British vessel, had three British directors who appear to have been appointed by the Hamburg-American line, the owners of practically all the stock. By an agreement, the British directors seem to have undertaken to carry out orders received from Hamburg. By the Merchant Shipping Act a British corporation owning a British ship must have its "principal place of business" in British dominions. Hamburg being deemed the place whence the British directors were "controlled," the "principal place of business" was deemed to be Hamburg, although it seemed clear that the ship traded only in the English coasting trade and that every decision concerning its operation was made by the British directors, who, of course, were unable to communicate with Hamburg. The criterion of "control" which Lord Parker's *dictum* had introduced was here carried to the length of actual unreality. "Control" of a vessel by

<sup>13</sup> *The Tommi and The Rothersand* (1914) 1 Br. & Col. P. C. 16. See also the "*Manchuria*," No. 1 (1905, Japan) 2 Russ. and Jap. P. C. 52, flying the Russian flag, and owned by Russian corporation with a majority of its stockholders neutrals. There was a trifling exception to this rule, in the first months of the war, in the case of *The Leda*, owned by a German subsidiary of the Standard Oil Co. and flying the German flag; she was restored on certain conditions because of the beneficial ownership of stock by American citizens. On the same ground, German tankers owned by the same company in foreign non-German ports were by Allied consent placed under the American flag. *New York Times*, Apr. 11, 1920.

<sup>14</sup> Even before that, however, the Privy Council had, in *The Proton* (P. C.) [1912] A. C. 578, disregarded the rule of art. 57 adopted by British Order in Council, on the ground that the Greek flag which the vessel was entitled to fly concealed a German ownership. See (1918) 28 YALE LAW JOURNAL, 585. It does not appear that the United States has departed from the rule of art. 57. See Naval Instructions Governing Maritime Warfare of June 30, 1917.

<sup>15</sup> *The Hamborn* [1918] P. 19 and on appeal to Privy Council (1919) 121 L. T. R. 463.

<sup>16</sup> (1916) 2 Br. and Col. P. C. 272.

an enemy, as in the carrying of despatches or belligerent service is an independent ground of condemnation, and seems to have become confused with the "control," in the sense of majority stock ownership, of a corporation. The establishment of such beneficial ownership in Germans would have been a sufficient and clear ground of condemnation in the *St. Tudno* case. In the principal case, *The Hamborn*, "conduct" derived from "control" was deemed the test of noxiousness, yet there was no evidence of conduct at all, but only of German ownership of stock. Here again, dynamic control inspiring conduct was confused with static control in the form of majority stock ownership. The *Polzeath*<sup>17</sup> was a case somewhat similar to the *St. Tudno*, except that Germans in Germany owned only nine hundred and one out of sixteen hundred and ten shares, and, as said by Swinfen Eady, J., "in that way hold the control of the company." Two directors were in Germany and two in England, but the Chairman, "the life and driving force of the company" and owner of the majority of the stock, was in Hamburg. On proceedings for the forfeiture of the ship on the ground that the company had its "principal place of business" outside the Dominions in violation of the Merchant Shipping Act, the decree was made, inasmuch as the "center from which instructions are given" and "control is exercised," namely, Hamburg, was the "principal place of business."

With respect to goods at sea, rules *sui generis* have been developed, both with respect to individual and corporate property. If the corporation is organized in enemy territory, its goods everywhere, if not on neutral vessels, are subject to confiscation, and no attempt is made by prize courts to determine the nationality of the stockholders.<sup>18</sup> Goods connected with a branch in enemy territory of a neutral corporation or firm are confiscable, if not on neutral vessels, but do not infect other goods of the corporation.<sup>19</sup> In the early part of the war, Sir Samuel Evans released goods consigned to a British company, whose directors and shareholders were all Germans.<sup>20</sup> He decided to follow the decision of the Court of Appeal in the *Daimler* case, which considered itself bound by the nationality, as determined by the place of incorporation, of the corporate entity. Doubtless his decision would have been quite different had the case arisen the following year. In the *Derfflinger*, No. 4,<sup>21</sup> the property of a Japanese

<sup>17</sup> (C. A.) [1916] P. 241.

<sup>18</sup> *The Roumanian* (1914) 1 Br. & Col. P. C. 75, oil consigned to a German company, a subsidiary of the Standard Oil Co., an American corporation. See also the principal case *Kronprinzessin Cecilie* (1919, P. C.) 119 L. T. R. 457. So, goods on a British ship consigned to a British branch of an Austrian company were condemned. *The Achilles* [1919] P. 340.

<sup>19</sup> *The Lutzow* (No. 4) (1916) 2 Br. & Col. P. C. 122. *The Mukden* (1905, Japan) 2 Russ. and Jap. P. C. 12.

<sup>20</sup> *The Poona* (1915) 1 Br. & Col. P. C. 275.

<sup>21</sup> (1916) 2 Br. & Col. P. C. 102.

limited partnership consisting of six Germans, though a corporate entity in Japan, was divided, the share of the partners resident in Germany being condemned and the balance released. This is merely an application of the rule with respect to ordinary partnerships owning a house of trade in non-enemy territory.<sup>22</sup> It would be highly desirable if some uniform test of the national character of corporations in time of war could be arrived at by international agreement.

The necessity of reaching the economic interest of enemies, to prevent hostile use thereof, induced the various belligerents in the late war readily to disregard the corporate entity of domestic corporations by sequestering or selling the stock owned by alien enemies in such corporations. When the enemy interest was preponderant, their liquidation or winding up was provided for. These provisions indicate clearly that the ownership of shares of stock was deemed an aliquot ownership of the corporation and its assets, such beneficial ownership constituting the test of enemy interest. So our State Department has usually not hesitated to interpose in behalf of American stockholders owning a substantial interest in a foreign corporation sustaining injury from a foreign government. For that reason, it will be interesting to observe whether the property in Germany to be turned over to the Allies by the Treaty of Peace, when owned by German corporations whose stock is principally owned by American citizens, will actually be taken as proposed. Not only would this disregard the "legal or equitable interests" of allied citizens in such property, which the Peace Treaty was designed to safeguard, but it would in effect bring about the curious result of despoiling the citizens of one Ally for the benefit of another, the value of the property thus taken being credited, on reparation account, to Germany, which has no interest in it. An equally interesting problem is raised by the case of the Austrian ships owned by corporations registered in Trieste and Fiume, the stockholders having also now become nationals of Italy or Jugoslavia, as the case may be. The economic interest impaired by the transfer of such ships to the Reparation Commission would clearly be Italian or Jugoslav, and not Austrian.

E. M. B.

#### THE CONFLICT OF LAWS OF JAPAN

De Becker's *International Private Law of Japan*, published in 1919, makes available in our own tongue the legislation of this remarkable people with respect to the conflict of laws—a subject which is gaining every year more importance from the standpoint of international trade. As the Japanese law of June 15, 1898 (Hōrei) constitutes the most complete legislative expression of the rules of the conflict of laws

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<sup>22</sup> *The Clan Grant* (1915) 1 Br. & Col. P. C. 272.

enacted in any of the leading countries of the world in recent times, a statement of its principal provisions may be of interest.<sup>1</sup>

*Renvoi.* "Renvoi" is adopted with respect to the rules governing (1) capacity, (2) marriage and divorce, (3) the relationship between parent and child, (4) guardianship and curatorship, (5) succession and wills, provided that the foreign law would apply Japanese law.<sup>2</sup>

*Capacity.* Following the trend of continental law the principle of nationality is adopted as the rule governing private capacity.<sup>3</sup> When a party to a juristic act in Japan is a person of full capacity according to Japanese law the act is valid, although he is not a person of full capacity according to the law of his nationality.<sup>4</sup> This qualification does not apply, however, with respect to acts falling within the family law or the law of succession, nor with respect to those affecting foreign immovables.<sup>5</sup> Whether the law of the situs or the national law of the owner determines his capacity to convey or mortgage immovable property does not clearly appear.<sup>6</sup> If a party is in possession of two or more nationalities the law of his nationality is that of the country whose nationality he last acquired; but in case one of the plural nationalities is that of Japan, Japanese law governs.<sup>7</sup>

*Formalities.* The form of a juristic act is determined by the law governing the effect of such act. The transaction is also valid if it conforms to the law of the place of the act, except in the case of juristic acts by which real rights or other rights which are registrable are created or disposed of, the latter being governed by the law of the situs.<sup>8</sup> The continental maxim, *locus regit actum*, is thus adopted in a permissive sense with the qualification indicated. The form in which it is expressed follows Article 11 of the Introductory Act of the German Civil Code.

*Property.* The law of the situs governs *real* rights relating to movables and immovables,<sup>9</sup> also the formalities with which a conveyance or mortgage of immovable property must be executed.<sup>10</sup> Concerning capacity to convey or to mortgage immovable property, see *supra*.

*Contracts.* The intention of the parties is the governing principle. If the intention of the parties is uncertain the law of the place where the contract was made controls.<sup>11</sup> Where the contract is made by

<sup>1</sup> The provisions may be found also in a French translation in 28 *Clunet*, *Journal de droit international privé*, 639-643.

<sup>2</sup> Art. 29 of the Law Concerning the Application of Laws in General (Hōrei); De Becker, *op. cit.*, 74.

<sup>3</sup> Art. 3, par. 1.

<sup>4</sup> Art. 3, par. 2; De Becker, *op. cit.*, 120. The Japanese law follows in this regard Art. 7, par. 3, of the Introductory Act of the German Civil Code.

<sup>5</sup> Art. 3, par. 3.

<sup>7</sup> Art. 27, par. 1.

<sup>9</sup> Art. 10.

<sup>11</sup> Art. 7.

<sup>6</sup> See De Becker, *op. cit.*, 76.

<sup>8</sup> Art. 8.

<sup>10</sup> Art. 8, par. 2.

correspondence it is the law of the place from which the offer was sent. If the recipient of the offer was ignorant at the time of his acceptance of the place from which the offer was sent, the place of the offeror's domicile is regarded as the place of the contract.<sup>12</sup> The discharge of contracts is controlled by the law governing their formation and effect. The mode of performance is subject to the law of the place of performance; for example, the method and formality of payment.<sup>13</sup>

*Statute of Limitations.* The statute of limitations is regarded as relating to the substance and is controlled by the law governing the obligation itself, but on grounds of policy no action can be brought if it is barred by the statute of limitations of the forum.<sup>14</sup>

*Assignment of Contracts.* Whether a contract or any other obligation is assignable is determined by the substantive law applicable to the obligation. The assignment itself and its effect is determined by the intention of the parties, and if the intention of the parties is uncertain by the law of the place of the act.<sup>15</sup> With respect to third parties the effect of the assignment is determined by the law of the debtor's domicile.<sup>16</sup>

*Quasi-Contracts.* The law of the place where the facts forming the cause of such obligation occurred governs.<sup>17</sup>

*Torts.* The law of the place where the tort was committed controls, but the obligation is valid only in so far as such act is unlawful under Japanese law, and the damages involved can only be claimed within the limits and by the methods recognized by Japanese law.<sup>18</sup>

*Marriage.* The conditions of the formation of a marriage are determined in respect to each party by the law of his or her country.<sup>19</sup> As regards formalities the law of the place of celebration appears to control absolutely.<sup>20</sup> Japanese subjects may contract a marriage abroad in the form prescribed by Japanese law.<sup>21</sup>

*Effect of Marriage.* The national law of the husband controls the effect of marriage upon the status of husband and wife.<sup>22</sup> With respect to contracts executed in Japan the wife will be regarded as a person of full capacity if she has such capacity under Japanese law.<sup>23</sup> Whenever a foreigner marries a Japanese woman who is the head of a house and enters her house, or is adopted by a Japanese and married to one of the latter's daughters, he becomes Japanese and is thus subject to Japanese law.<sup>24</sup>

<sup>12</sup> Art. 9, par. 2.

<sup>13</sup> De Becker, *op. cit.*, 106.

<sup>14</sup> *Ibid.*, 109.

<sup>15</sup> Art. 7.

<sup>16</sup> Art. 10.

<sup>17</sup> Art. 11.

<sup>18</sup> Art. 11; De Becker, *op. cit.*, 105-106.

<sup>19</sup> Art. 13, par. 1.

<sup>20</sup> Art. 13, par. 1; De Becker, *op. cit.*, 117.

<sup>21</sup> Art. 13; Japanese Civil Code, art. 777.

<sup>22</sup> Art. 14, par. 1.

<sup>23</sup> De Becker, *op. cit.*, 120.

<sup>24</sup> Art. 14, par. 2; De Becker, *op. cit.*, 121.

Marriage contracts are governed by the law of the husband's nationality at the time of the celebration of the marriage. If the parties subsequently acquire the Japanese nationality or remove their domicil to Japan the agreement, in order to be binding upon third parties, must be registered within one year if it differs from the Japanese legal system.<sup>25</sup> If no marriage contract is made the rights of the parties are determined by the law of the husband's home country at the time of the marriage. A change of domicil or of nationality has no effect upon their rights.<sup>26</sup>

*Divorce.* Japanese courts have jurisdiction to grant a divorce to foreigners who are domiciled in or residents of Japan.<sup>27</sup> A divorce will be granted only for a ground which is recognized as such under the law of the home country of the husband at the time the act occurred, and under Japanese law.<sup>28</sup>

*Parent and Child.* The conditions for the legitimation of an illegitimate child are governed, with respect to the father or mother, by the law of the state to which such father or mother belongs at the time of such legitimation, and with respect to the child by the law of the state to which the child belongs at that time. The effects of the legitimation are determined by the national law of the father or mother.<sup>29</sup> The conditions of adoption are governed in respect to each party by the law of his or her home country.<sup>30</sup> The effect of adoption is determined by the law of the home country of the adoptive parent.<sup>31</sup> The parental power is determined by the law of the home country of the father, or, if he is dead, by that of the mother, within the limits recognized by the law of the place where it is to be exercised.<sup>32</sup> The rights of the parent with respect to the property of the child, whether movable or immovable, are governed by the law of the father's nationality or, if he is dead, by that of the mother.<sup>33</sup>

*Support.* The duty to furnish support is controlled by the law of the home country of the party from whom it is demanded.<sup>34</sup>

*Guardianship and Curatorship.* An alien domiciled or resident in Japan may be placed under guardianship or curatorship if there is a sufficient ground according to the law of his home country and there is no person to exercise the function of a guardian under the law of his home country. When the guardian is appointed by a Japanese court the legal relations involved in the guardianship are governed by Japanese law; if appointed by a foreign court, they are determined by the law of the home country of the ward.<sup>35</sup>

<sup>25</sup> Art. 15.

<sup>26</sup> De Becker, *op. cit.*, 123-124.

<sup>27</sup> Art. 1, Law Concerning the Procedure in Actions Relating to Personal Status. De Becker, *op. cit.*, 124.

<sup>28</sup> Art. 11.

<sup>29</sup> Art. 18, par. 2.

<sup>30</sup> Art. 19, first part.

<sup>31</sup> Art. 19, second part.

<sup>32</sup> Art. 20; De Becker, *op. cit.*, 135.

<sup>33</sup> Art. 20.

<sup>34</sup> Art. 21.

<sup>35</sup> Arts. 23, 24.

*Succession.* Intestate succession to movables and immovables is governed by the national law of the decedent.<sup>36</sup> The material conditions and effect of a will, whether it relates to movable or immovable property, are determined by the law of the home country of the testator at the time of the execution of the will.<sup>37</sup> A change of nationality produces no effect. A will is sufficient in formal respects regardless of the character of the property, if it satisfies the law of the home country of the testator at the time of the execution of the will or the law of the place of execution.<sup>38</sup> A will may be revoked according to the law of the home country of the testator at the time of revoking, or according to the law of the place of the act.<sup>39</sup>

The foregoing summary shows that the Japanese legislator has accepted the continental rules of the conflict of laws. Only in one instance can there be seen any approach to the English system, namely, in the rule governing torts. One or two points deserve special attention. Contrary to the prevailing view on the subject it accepts the *renvoi* in the limited form suggested by the German Civil Code. With respect to the question of nationality it has decided a point which has troubled the continental writers a good deal.<sup>40</sup> What is the law of a party's nationality for the purpose of the conflict of laws when he is claimed as a subject by two or more foreign governments? The Japanese law adopts the rule that it is the law of the country whose nationality was last acquired. As regards contracts by correspondence it is interesting to note that the Japanese law accepts the law of the place from which the offer was sent, except that the law of the domicile of the offeror is substituted if the recipient of the offer was ignorant of the place from which the offer was sent.

E. G. L.

#### IMPLIED WARRANTIES OF WHOLESOMENESS AGAIN

Charged waters replace strong waters, and with the change come perils little thought of. A recent case<sup>1</sup> lists "articles inherently dangerous": poisons, dynamite, gunpowder, torpedoes—and soft drink bottles! One who manufactures such articles, says the court, is liable in tort to third parties whom their explosion injures, unless he can prove that he has exercised reasonable care with reference to the article manufactured. Such treatment of the pop-bottle as of itself a danger-

<sup>36</sup> Art. 25.

<sup>37</sup> Art. 26.

<sup>38</sup> Art. 26, par. I.

<sup>39</sup> Art. 26, par. 2.

<sup>40</sup> See (1920) 20 COL. L. REV. 250-252.

<sup>1</sup> *Johnson v. Cadillac Motor Car Co.* (1920, C. C. A. 2d) 261 Fed. 878, (1920) 29 YALE LAW JOURNAL, 568. In this comment the attempt is to analyze, not to state the law in full, nor to give full citations. For more complete and detailed statement of the positive law see (1918) 27 YALE LAW JOURNAL, 1068, (1919-20) 5 IOWA L. BULL. 6, 86, and the other comments collected in note 16.



ous instrument has been by no means universal,<sup>2</sup> but there is considerable authority in its favor, particularly among the very recent cases.<sup>3</sup> There is some difference of opinion on whether knowledge by the manufacturer that *his* bottles explode is a condition to imposing the strict duty upon him;<sup>4</sup> and there is a difference as to what facts suffice to establish *prima facie* breach of that duty in the individual case.<sup>5</sup> But there seems to be unanimity among American plaintiffs in laying their case in tort. Our English brethren have found a simpler method of recovery—perhaps under pressure of necessity, since they do not recognize the liability in tort.<sup>6</sup> In *Gedding v. Marsh* (1920, K. B.) 36 Times L. R. 337, recovery was allowed a vendee under the Sale of Goods Act, 1893, sec. 14 (1)—our Sales Act, sec. 15 (1)—on an implied warranty. To be sure, the *bottles* had not been sold with the mineral waters, but hired against a deposit, as is usual here as well. But the court held the bottles to be goods “supplied under a contract of sale”; hence, since they were known to be for the particular purpose of containing the drinks, and since the buyer relied on the seller in regard to them, there was an implied warranty of their fitness for that purpose. The decision seems a fair interpretation of the statute; it makes negligence immaterial, thus going beyond even the *res ipsa loquitur* rule; it will hoist dealer as well as manufacturer on his own gas-charged petard.

Implied warranty of this kind is a growing thing. It has currently been thought to confer rights on vendees only. Indeed there was a long-persistent tendency to look upon rights even in tort for injury suffered from defective goods as founded on a “legal duty incident to” the contract, although not contained in its terms, and so to limit such rights to persons “privy” to the contract—whether sale or

<sup>2</sup> *Glaser v. Seitz* (1901, Sup. Ct.) 71 N. Y. Supp. 942, 35 Misc. 341; *O'Neill v. James* (1904) 138 Mich. 567, 101 N. W. 828, 68 L. R. A. 342; *Stone v. Van Noy R. R. News Co.* (1913) 153 Ky. 240, 154 S. W. 1092.

<sup>3</sup> *Weiser v. Holzman* (1903) 33 Wash. 87, 73 Pac. 797; *Grant v. Chero-Cola Bottling Co.* (1918) 176 N. C. 256, 97 S. E. 27, considerably extending *Cashwell v. Fayetteville Pepsi-Cola Bottling Works* (1917) 174 N. C. 324, 93 S. E. 901; cf. *Colyar v. Little Rock Bottling Works* (1914) 114 Ark. 140, 169 S. W. 810; cf. *Payne v. Rome Coca Cola Bottling Co.* (1912) 10 Ga. App. 763, 73 S. E. 1087.

<sup>4</sup> Such knowledge necessary: *Colyar v. Little Rock Bottling Works*, *supra*; *Stone v. Van Noy R. R. News Co.*, *supra*. Contra, *Payne v. Rome Coca Cola Bottling Co.*, *supra*; *Weiser v. Holzman*, *supra*; cf. *Grant v. Chero-Cola Bottling Co.*, *supra*.

<sup>5</sup> Applying *res ipsa loquitur* from the mere fact of the one explosion: *Payne v. Coca-Cola Bottling Co.*, *supra*. Denying *res ipsa loquitur*: *Glaser v. Seitz*, *supra*; *O'Neill v. James*, *supra*; *Cashwell v. Fayetteville Bottling Co.*, *supra*. Allowing evidence of other explosions to go to jury: *Dail v. Taylor* (1909) 151 N. C. 284, 66 S. E. 135, 28 L. R. A. (N. S.) 949; *Colyar v. Little Rock Bottling Works*, *supra*.

<sup>6</sup> *Earl v. Lubbock* (C. A.) [1905] 1 K. B. 253; *Bates v. Batey* [1913] 3 K. B. 351.

bailment or whatnot.<sup>7</sup> It was a great advance to free the tort duty of the maker from such an arbitrary delimitation of the persons protected by it. It might be an advance equally great to cease attempts to mark off classes of ordinary articles, dangerous articles, and foods and drugs, with specifications of the degree of care required of a maker in each class, and to lay down a single controlling principle: that any maker of any article is under a duty to any legitimate user, in making the article and putting it into commerce, to use care commensurate to the nature of the article; or, still more sweepingly, that any person putting an article in the way of being used by another, is under a duty to use the care proper in view of what he ought to know of the nature and use of the article.<sup>8</sup>

But is it an equal advance to extend indefinitely the class of persons protected by an "implied warranty"? One comes on dicta that such a "warranty" may give full rights to a person for whose benefit it was intended, though he be not the buyer.<sup>9</sup> And in *Davis v. Van Camp Packing Co.* (1920, Iowa) 176 N. W. 382, where the son of the purchaser from the retailer who bought from the wholesaler who bought from the manufacturer, was suing the last on an implied warranty of wholesomeness of a can of beans, it was held error not to let the case go to the jury on that question. "The question as to privity is not controlling."<sup>10</sup> It was also held, and wisely so, that the possibility of recovery on such a warranty did not exclude the possibility of an alternate recovery for negligence; and that the plaintiff might join counts drawn on the two theories.<sup>11</sup>

<sup>7</sup> See 29 Cyc. 478; and see *Dail v. Taylor*, *supra*, doubted in *Cashwell v. Fayetteville etc. Works*, *supra*, and repudiated in *Grant v. Chero-Cola Bottling Co.*, *supra*.

<sup>8</sup> Here, as elsewhere where matters relating to torts are touched on, the writer is indebted to the suggestions and criticism of Professor Edward S. Thurston. See also Chapin, *Torts* (1917) 517; and see the language of Brett, M. R. in *Heaven v. Pender* (1883) 11 Q. B. D. 503. "Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of another, a duty arises to use ordinary care and skill to avoid such danger."

<sup>9</sup> See e. g. *O'Neill v. James*, *supra*; (1918) 27 YALE LAW JOURNAL, 1071, note 15; cf. *Lewis v. Terry* (1896) 111 Calif. 39, 43 Pac. 398; *Tomlinson v. Armour & Co.* (1908, Ct. Err.) 75 N. J. L. 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923.

<sup>10</sup> See in accord *Catani v. Swift & Co.* (1915) 251 Pa. 52, 95 Atl. 931.

<sup>11</sup> That the two theories can coexist is so obvious as to need no further argument. (1918) 27 YALE LAW JOURNAL, 1068, 1073. And the modern decisions are taking this view. See the admirable set of Massachusetts decisions: *Ward v. Great Atlantic etc. Co.*, *Ash v. Childs Dining Hall Co.*, *Friend v. Same* (1918) 231 Mass. 90, 86, 65, 120 N. E. 225, 396, 407; *Walters v. United Grocery Co.* (1918, Utah) 172 Pac. 473; *Ward v. Morehead City Sea Food Co.* (1916) 171 N. C. 33, 87 S. E. 958; see *Tavani v. Swift & Co.* (1918) 262 Pa. 184, 105 Atl.

There is much work still to be done before it will become clear what is truly meant by "implied warranty" in such a case. Roughly, it may be suggested that it is an insurer's duty on the warrantor to make good damage—measured either as if in contract or as if in tort—caused to the warrantee by non-conformance of the goods with the warranty; that it arises normally in conjunction with a sale; and that it arises, theoretically, out of a tacit representation by seller to buyer, on which the buyer reasonably relies.<sup>12</sup> But "tacit" representations need interpretation. Is the representation one of good faith merely, or of diligence, or of the objective existence of a quality? Is it: "this article is, flatly, thus"; or "it is thus, as far as my due care could make it"; or merely "it is thus, so far as I know"? Under our law, where the warranty exists at all, the strong tendency is to measure it as a flat representation of the existence of the quality concerned. There is a further tendency to standardize both the representation and the reliance on it: "Where a dealer sells food for immediate consumption, there is always an implied warranty of

55; and see the dissent in *Drury v. Armour & Co.* (1919, Ark.) 216 S. W. 40. Nor is there sound reason why counts on the two theories should not be joined, even in jurisdictions which will not allow joining counts in tort and contract. Current conceptions notwithstanding, warranty is quite as much tort as contract, especially implied warranty. Unlike *assumpsit*, warranty actions have never been freed from the marks of their origin in tort. It is not only that the damage recoverable is normally measured as in tort. The duty involved, as is sought to be shown in the text, is closely related to the tort duty to use care; and where the rule of the *Davis* case is applied, the duty is as "general" as in tort. And finally, suit in tort still lies in some jurisdictions *on the warranty*. See *Farrell v. Manhattan Market Co.* (1908) 194 Mass. 271, 84 N. E. 481, 15 L. R. A. (N. S.) 884, 126 Am. St. Rep. 436; cf. *Hobart v. Young* (1891) 63 Vt. 363, 21 Atl. 612. The waste of time, money and energy where a plaintiff is forced to select a single theory appear in the cases generally. See e. g. *Ash v. Childs Dining Hall Co.*, *supra*.

<sup>12</sup> It is not intended here to deal in any way with those so-called implied warranties which are merely interpretations of the words of the contractors, as when "Manilla hemp" is held to mean "merchantable Manilla hemp." Such a "warranty"—like any term of any executory contract—raises the question primarily of the measure of a *promise* or a *condition* of *future* happenings; the question concerning it comes up most often in comparing the promise or condition with the alleged fulfillment of it. But an "implied warranty" proper raises the question of the measure of the *representation* of *existing fact*, and is related more closely to estoppel than to contract. One can clearly distinguish two types of such warranty by "tacit representation." In the one (as in warranty of title by the ordinary seller, or of authority by an agent assuming to act as such) the representation is so clearly expressed in fact that reasonable men could hardly differ as to its existence. The seller merely expresses himself by acts instead of words: In the other class, that under discussion in this comment, the representation is, if existent at all, at least ambiguous. Men might differ as to its scope. The duties it imposes when it is uniformly assumed to exist and a uniform scope is given it are therefore quite as likely to be non-consensual as consensual. Professor Costigan's remarks in (1907) 20 HARV. L. REV. 206 are suggestive.

wholesomeness."<sup>13</sup> That rule has gradually established itself in the common law; and the interpretation of the Sales Act by the courts bids fair to leave it practically unimpaired.<sup>14</sup> But it is a sweeping rule; some courts have felt it harsh; to the standardized representation and reliance arise then standardized exceptions: "but not in the case of food sold in the original package, where both parties rely on the manufacturer."<sup>15</sup> It must be clear on thought that so far as either the rule or the exception fails to mirror the true state of mind of buyer or seller, we have here the law simply affixing an insurer's duty to a given situation, by reason of history and "policy." And

<sup>13</sup> It has been argued that the "American theory" is *not* reliance, but protection of the consumer's health. 5 IOWA L. BULL. 6, 86. This policy has undoubtedly been strong in the courts' minds; but it is believed the cases show it always joined, expressly or impliedly, with ideas of representation. The desire to protect health is what has produced the standardization.—What when the sale is to a dealer, for re-sale for ultimate consumption? The argument against "implied warranty" here is that there is no reasonable ground for standardized "reliance" by one dealer on another. Cf. *Swank v. Battaglia* (1917) 84 Ore. 159, 164 Pac. 705, L. R. A. 1917 F 469. If reasonable reliance in fact existed, this would make a difference, under the Sales Act, sec. 15 (1); so probably in the case of package goods. And even at common law the case would be otherwise if the seller were a maker. The measure of damage would cover loss of custom due to serving food as good, in reliance on the seller's representation. This is the measure which has been held applicable in a suit in tort by a sub-vendee against the maker. *Mazetti v. Armour & Co.* (1913) 75 Wash. 622, 135 Pac. 633, 48 L. R. A. (N. S.) 213. But between dealers *wholesomeness* may enter merely as an element of merchantability. See *Piper Co. v. Oppenheimer* (1913, Tex. Civ. App.) 158 S. W. 777; *Neiman v. Channellene Oil & Mfg. Co.* (1910) 112 Minn. 11, 127 N. W. 394; and (1920) 5 IOWA L. BULL. 6, 20.

<sup>14</sup> *Ward v. Great Atlantic & Pacific Tea Co.* (1918) 231 Mass. 90, 120 N. E. 225. The court found in the mere purchase of food from a retail dealer a sufficient indication of the purpose the food was intended for—eating—and of reliance on the seller in the selection of the food, to raise a warranty under sec. 15 (1); applying this even to canned food, unless the customer "demands a particular brand." *Jackson v. Watson & Sons* [1909] 2 K. B. 193; *Rinaldi v. Mohican Co.* (1918) 225 N. Y. 70, 121 N. E. 471. The New York court made the facts above indicated conclusive of warranty, if nothing more was shown—where the seller had had an opportunity to examine. This leaves it open to require something further, in the case of original package goods. New York also soundly rejects the indications in the Massachusetts cases that the existence of the warranty must turn on who does "the" selecting: selection by the purchaser for any other purpose than to secure *wholesomeness* should be wholly without effect on the warranty of wholesomeness.

<sup>15</sup> *Bigelow v. Maine Central Ry.* (1912) 110 Maine, 105, 85 Atl. 396, 43 L. R. A. (N. S.) 627; see *Walters v. United Grocery Co.* (1918, Utah) 172 Pac. 473; see *Flessner v. Carstens Packing Co.* (1916) 93 Wash. 48, 160 Pac. 14; cf. *Mazetti v. Armour & Co.*, *supra*, n. 12. But this view, while it seems to be finding favor, is not universal. *Sloan v. Woolworth Co.* (1915) 193 Ill App. 620; *Friend v. Childs Dining Hall* (1918) 231 Mass. 65, 120 N. E. 407 (Sales Act); cf. *Rinaldi v. Mohican Co.* (1918) 225 N. Y. 70, 121 N. E. 471 (Sales Act); cf. *Walden v. Wheeler* (1913) 153 Ky. 181, 154 S. W. 1088, 44 L. R. A. (N. S.) 597 (cattle feed; rescission allowed, but not incidental damage).

if the "warranty" be held as in the *Davis* case to cover users generally, we have an insurer's duty on a manufacturer which in its nature jibes point for point with his duty in tort; it differs only in that it is more severe, and, apparently, requires the additional fact of a *sale* by him, to come into existence.

It admits of a serious doubt whether sellers, in the main, would willingly assume such flat insurance of quality if their attention were called to the question; or whether buyers would expect them to; it admits of doubt equally serious whether, if they would not, the law should, by main strength, force an insurer's duty—as opposed to a duty to use all due care—into these cases.<sup>16</sup> But what with the common-law rules protecting consumers of food, and the Sales Act on food and other articles, there is, as indicated above, strong modern trend to extend this form of insurer's duty much further than in the past. This is not without analogy in other fields—as instance the Workmen's Compensation Acts—and there should be no hesitation in imposing such duties whenever they have been fairly shown to be socially desirable. But in the matter of implied warranty, such a showing is still lacking. Neither the true nature of the doctrine, its basis in policy, nor its social results have yet been satisfactorily examined.<sup>17</sup>

<sup>16</sup> See (1918) 27 YALE LAW JOURNAL, 1068, 1071, and cases cited; *cf. Merrill v. Hodson* (1914) 88 Conn. 314, 91 Atl. 533, (1914) 24 YALE LAW JOURNAL, 73; *Travis v. L. & N. R. R.* (1913) 183 Ala. 415, 62 So. 851; *Valeri v. Pullman Co.* (1914, S. D. N. Y.) 218 Fed. 519. *But it should not be forgotten that res ipsa loquitur can be used to make a negligence rule approach very close to a rule of guaranty.*

<sup>17</sup> The law has been reviewed extensively. (1918) 27 YALE LAW JOURNAL, 1068; (1918) 16 MICH. L. REV. 555; (1919) 7 CALIF. L. REV. 360; (1918) 32 HARV. L. REV. 71; (1919) 3 MINN. L. REV. 285; 15 L. R. A. (N. S.) 884; 19 *ibid.* 923; 48 *ibid.* 213, 219; *ibid.* 1917 F, 472. By all odds the ablest and most exhaustive treatment is by Rollin M. Perkins, *Unwholesome Food as a Source of Liability* (1919-20) 5 IOWA L. BULL. 6-35, 86-111. There the English theory of reliance by the purchaser is contrasted with the American theory of protection of the consumer of food, as a basis for imposition of the warranty. The author's analysis of the subject matter is in the main admirable, and his views as to the logical consequences of the American theory—with which he is in full agreement—are so strongly argued as to be almost inescapable—unless, perhaps, his belief that the Sales Act will work no substantial change. See note 13, *supra*. Nevertheless, the vital basis of this growing doctrine has yet to be examined. Research into economic and sociological facts is not a pursuit for which judges have great leisure. Cases must be decided as they arise, and criticism should be made with that in view. But careful research into *facts*, not merely into *decisions*, is needed before any man can intelligently judge whether an "implied warranty" of wholesomeness is socially desirable at all, and how far it can wisely be extended. Studies by the Health Departments of our cities might provide a foundation. It is suggested, with some diffidence, that such a study ought to include: the number of cases of injury from impure food, and some estimate of the damage; a classification of the damage according to the nature of the defect causing it, to determine how far due care can control such damage, and how far, therefore, a warranty rule might work a

If we assume, however, the wisdom of imposing this insurer's duty on the dealer in food, then there is much to be said in favor of the decision in *Davis v. VanCamp Packing Co.* There is sharp division on whether a dealer who is not a maker "impliedly warrants" food sold by him in the original package. Assume first, that he is held not to. Then we have this rather anomalous situation: if you buy bulk food, A, the dealer, insures you; B, the maker or grower, answering only for due care. If you buy package food from the same dealer A, you gain nothing against B, while you lose your claim on A as a dealer. If food ought to be insured to the consumer, something is wrong. The *Davis* case would find the remedy in making the manufacturer insure. Now assume that the dealer is held to "warrant" package food. What reason now for the *Davis* decision? If there be any truth in the suggestion that "implied warranty" arises from tacit representation, reasonably relied on, the case is still sound. Surely a man who packs food for sale makes a tacit representation to any consumer as sweeping as is the representation of a retailer who sells food.<sup>18</sup> And surely any legitimate user is, if anything, even more fully justified in his reliance in the case of goods in can or package. The proof of package pudding is only in the eating. We cannot inspect before purchase; to open is to destroy. And even before eating package food, especially where already cooked, it is difficult to test with certainty. Which one of us can tell, except by taste or indigestion, whether his potted pig-meat be pork or porcupine?

Such reasoning brings up again another much-mooted question. The Van Camp Packing Co. did not sell to Davis. Is "implied warranty" to be attached *only to a sale*? It is easy to lay down such a rule.<sup>19</sup> In *Canavan v. City of Mechanicville* (1920, App. Div.) 180

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change from a rule based on negligence; a further classification of the damage according to food prepared, and food not prepared, by the seller (including a restaurant keeper); and in the latter class, according to food open to inspection and food sold in original packages; an estimate, based on the above, of the financial ability of the parties liable under the various competing rules, to pay the damage that would, under each rule, be imposed on them; a study of the profits of the food business to the dealers and makers (according to the classes into which they fall under the competing rules), so as to see what proportion of additional operating expense the rules, if really carried out, would entail; and finally, a study of the feasibility of distribution of risk, by re-insurance or otherwise, among the various classes of dealers and makers. If small independent dealers, whom a single heavy recovery would ruin, are desirable, the "warranty" can hardly produce general beneficial effects without such re-insurance. The same sort of question comes up in every field of law. For excellent discussion of the general question, see Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law* (1916) 29 HARV. L. REV. 353.

<sup>18</sup> See *Tomlinson v. Armour & Co.* (1908, Ct. Err.) 75 N. J. L. 748, 70 Atl. 314, for a clear development of this view.

<sup>19</sup> It is laid down, practically, in the cases cited in note 15. Cf. also *Walters*

N. Y. Supp. 62, the plaintiff was a householder in the defendant city; he contracted typhoid from germs contained in the water furnished him. When he sued the city on an "implied warranty" of wholesomeness, a demurrer to his complaint was sustained.<sup>20</sup> "Unless there be a sale with the ordinary circumstances of transfer of title and possession of the thing sold, for a price given for a particular thing, the peculiar facts out of which a warranty is implied do not exist, and there is no warranty." The court would seem sound in its analysis. What the plaintiff paid for is indeed a "privilege to make use of the water as it passed through his dwelling . . . precisely as a riparian owner might enjoy the right [privilege] to take water from an open stream."<sup>21</sup> And where the cost of water supply is met by assessments on the realty benefited, the analogy is close, to a coöperative project. But to conclude from this that there *can be* no warranty is coffee-mill jurisprudence. If the project be coöperative, would not the law do well to apportion the loss incident to its defective execution? The transaction is not a sale—granted. But that does not touch the vital questions: why do we attach an insurer's duty to sales of food and drink? and do the same reasons exist, equally strong, for attaching such a duty to the sale of a privilege of consumption?<sup>22</sup> Practically the same problem is to be found in the recent cases threshing over the question of "implied warranty" by a restaurant keeper. He sells, at least at a *table d'hôte* meal, not food, but a privilege of consuming food. That is sound; but it only prepares the way for an answer to the question of his insurer's duty, or of his infraction of criminal statutes against the "sale" of game out of season, or of liquor. Careful analysis is good to see; without it the law cannot escape confusion. But analysis of itself can *solve* no problems. It brings clarity of statement; it does not bring wisdom of decision.

K. N. L.

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*v. United Grocery Co.* (1918, Utah) 172 Pac. 473. *Contra, Friend v. Childs Dining Hall Co.* (1919) 231 Mass. 65, 120 N. E. 407. See (1918) 27 YALE LAW JOURNAL, 1068, 1069; and that the New York rule agrees with Massachusetts (1920) 5 IOWA L. BULL. 96 ff.

<sup>20</sup>In accord see *Green v. Ashland Water Co.* (1898) 101 Wis. 258, 77 N. W. 722, 43 L. R. A. 117. The court there reasoned largely from the unbearable burden which the warranty would impose upon the supplier of water. But how unbearable the burden would be, depends on facts not considered in the opinion. See note 17, *supra*.

<sup>21</sup>It should, however, be observed that he also obtained a power, to make such water his own by appropriating it, and so to acquire title and possession of a thing—as does a riparian owner.

<sup>22</sup>Indeed, may not the reasons exist, even where no consideration at all is given the insurer? He is already under such a duty to use all due care. See Swayze, *The Growing Law* (1915) 25 YALE LAW JOURNAL, 1, 4-7.

COMMERCE, LABOR, AND LIQUOR, *et al.*

Who can sue on a third-party beneficiary contract is not an altogether settled point.<sup>1</sup> But one rarely sees, as in *Smart Set Specialty Clothing Co. v. Franklin Knitting Co.* (1920, App. Div.) 180 N. Y. Supp. 821, the spectacle of the same man attempting to sue twice. One M had made a contract with the defendant for the benefit of the company which is the present plaintiff. M then bought practically all the stock of that company,<sup>2</sup> and when the contract was broken, sued the defendant and recovered damages for the diminution in value of his stock. Now "the plaintiff company"—which is simply M operating a certain business as a corporation<sup>3</sup>—sues the defendant a second time on the contract. To sustain the complaint, said the court, "would necessarily result in a double recovery of damages." The decision is clearly sound. The recovery would indeed be double, not merely from the defendant, but for M. But the case does not of itself show that both promisee and beneficiary, if not identical, may not each have his right to whatever damages he can prove.

*Folsom Engraving Co. v. McNeil* (1920, Mass.) 126 N. E. 479, illustrates again what seems to be the decided drift of recent judicial decision to cut down the freedom of action slowly won in past decades by the labor unions.<sup>4</sup> The union there proposed to the plaintiff an agreement providing absolute collective bargaining, preferential employment with a minimum wage scale, retention in employment of permanent employees even if there was not sufficient work for them, and compulsory arbitration of all disputes. The plaintiffs refused assent, and the union voted to strike. An injunction was granted against their striking. The court took its stand on the employer's "right to the free flow of labor" unhampered by an unlawful strike: a strike to enforce a completed contract was one thing, a strike to force an employer into an agreement was another; a strike to secure

<sup>1</sup> See Anson, *Contract* (3d Am. ed. by Corbin, 1919) 335 ff.

<sup>2</sup> He held 44 shares, his wife 5, and another person—apparently a dummy director—held one.

<sup>3</sup> See (1920) 29 YALE LAW JOURNAL, 659.

<sup>4</sup> The course of authority up to that date is well outlined by Jeremiah Smith, *Crucial Issues in Labor Litigation* (1907) 20 HARV. L. REV. 253, 345, 429. As illustrating the recent tendency toward limitation, see e. g. *Hitchman Coal & Coke Co. v. Mitchell* (1917) 245 U. S. 229, 38 Sup. Ct. 65, (1918) 27 YALE LAW JOURNAL, 779; *Webb v. Cooks' etc. Union No. 748* (1918, Tex. Civ. App.) 205 S. W. 465; *Local Union No. 313 v. Stathakis* (1918) 135 Ark. 86, 205 S. W. 450, (1918) 28 YALE LAW JOURNAL, 200; *Kroger Grocery Co. v. Retail Clerks' etc. Assn.* (1918, E. D. Mo.) 250 Fed. 890; *Montgomery v. Pacific Electric Ry.* (1919, C. C. A. 9th) 258 Fed. 382; *Patterson Glass Co. v. Thomas* (1919, Calif. App.) 183 Pac. 190; *Rosenberg v. Retail Clerks' Assn.* (1918, Calif. App.) 177 Pac. 365.



monopoly of the work on a particular job for members of a union already doing a part of that work, was still lawful,<sup>5</sup> but not a strike aimed at securing a monopoly of the labor market; and finally, St. 1913, ch. 690, privileging certain kinds of peaceful persuasion, was limited in its application to lawful strikes.<sup>6</sup> How far the decision is wise, is a question too wide for discussion here. So much is sure: *Picket v. Walsh*<sup>7</sup> is undergoing that nibbling process by which courts deny legal effectiveness to a decision out of line with their present views.

In striking contrast, as extending still farther the unions' freedom of action, stands New York,<sup>8</sup> her most recent pronouncement being the hotly contested decision in *P. Reardon, Inc. v. Caton* (1919, App. Div.) 178 N. Y. Supp. 713. The defendants—associated unincorporated unions and officers of unions—had succeeded in unionizing the entire freight trucking, checking and handling business of the New York docks, except for the plaintiff and one firm of truckers, who ran on an open shop basis with working conditions less favorable than those demanded by the truckmen's union.<sup>9</sup> "To bring about a uniform rate of wages and hours of work, by means of unionizing the entire laboring force, the various local unions . . . resolved that members of the unions should not continue to work with non-union men, and accordingly would refuse to handle merchandise brought to the piers, or called for at the piers, by . . . truckmen who were not members of the union." They did so refuse, to the decided damage of the plaintiff's business; the plaintiff commenced an action and obtained an injunction *pendente lite*, but this last the Appellate Division dissolved, by a vote of three to two. New York had already ruled that a union was privileged to refuse its members permission to work in the same shop with non-union men, or to work

<sup>5</sup> *Picket v. Walsh* (1906) 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 7 Ann. Cas. 638. The court cites the Massachusetts cases to its points, copiously.

<sup>6</sup> On the Massachusetts test of the lawfulness of a strike, see also (1919) 28 YALE LAW JOURNAL, 611, and (1918) 27 *ibid.*, 1088.

<sup>7</sup> Note 5, *supra*.

<sup>8</sup> *Bossert v. Dhuy* (1917) 221 N. Y. 342, 117 N. E. 582, (1918) 27 YALE LAW JOURNAL, 539. Illustrations of this tendency persisting in other jurisdictions are *Duplex Printing Co. v. Deering* (1918, C. C. A. 2d) 252 Fed. 722, over the sturdy dissent of Rogers, C. J.; *State v. Employers of Labor* (1918, Neb.) 169 N. W. 717; *Truax v. Bisbee Local No. 380* (1918, Ariz.) 171 Pac. 121; *Same v. Corrigan*, 176 *ibid.*, 570. The first three cases are valuable. Since the text was written has appeared *Michaels v. Hillman* (1920, Sup. Ct.) 181 N. Y. Supp. 165, citing and relying on the *Hitchman* Case and the New York cases indiscriminately, without apparently noticing the inconsistencies not only of their tendencies but of their decisions.

<sup>9</sup> The plaintiffs demanded a ten-hour day, and did not pay the union rate for over-time.

on the erection of materials furnished by a non-union shop, and even to induce workmen in other trades not to work on such materials; and that if such determination was reached not primarily with intent to injure the plaintiff, but primarily to better the condition of the union's members, incidental injury to the proprietor of the non-union shop gave him no right to an injunction.<sup>10</sup> The betterment there sought was the establishment of a nation-wide carpenter's union; that here sought is the unionization of all the freight-handling of the Port of New York. The novelty of the instant case lies less in privileging the boycott even though the immediate benefits must result to a union not the defendants' own, than in applying the rule to the employees of common carriers. It is on this that the dissenting judges join issue, contending that neither a carrier nor its employees is free to refuse accommodation to any person.<sup>11</sup> The majority answers, that irregularly employed freight-handlers are not on one footing with the regular agents of a carrier; and moreover that no question regarding carriers is really presented by the issues. This last seems something of a refined technicality, in view of the sister, though separate, case of *Reardon v. International Mercantile Marine Co.* (1919, App. Div.) 178 N. Y. Supp. 722, where the same plaintiff was seeking to enjoin the carriers from allowing their employees to practice the discrimination in question. That case presents a remarkable instance of the balance of convenience doctrine.<sup>12</sup> The injunction was refused primarily because practically the entire force of 125,000 dock laborers, checkers, weighers, etc., were unionized, "and if they are left free to . . . better their condition by lawful methods, any attempt by the steamship companies to force them to work with non-union drivers would only result in a general strike and tie-up of the freight of the port." Truly circumstances seem to alter cases. It is interesting that the majority was obtained in this second case only because Putnam, J., though in agreement with the reasoning of the minority, felt himself bound by the decision in the first case, and felt enjoining the employers, while leaving the men free to discriminate, to be unjustifiable.

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Uniform legislation is somewhat slow in unifying law. In *First Nat. Bank v. Walling* (1920, Tex. Civ. App.) 218 S. W. 1080, the problem of *Young v. Grote* comes up again: a check is drawn so negligently that raising was made easy; payment of the raised check is made by the innocent drawee; has it thereby extinguished *pro tanto* its debt to its depositor? Yes, says the court—and soundly so.<sup>13</sup> But,

<sup>10</sup> *Bossett v. Dhuy, supra*. But see (1919) 29 YALE LAW JOURNAL, 120.

<sup>11</sup> One may question whether our neighbor *The Freeman* would object to this instance of the use of "that pleasant little device known as the majority of one."

<sup>12</sup> This doctrine is also hinted at as a ground of decision in *P. Reardon, Inc. v. Caton*.

<sup>13</sup> (1917) 27 YALE LAW JOURNAL, 242; and see cases collected Brannan, *Negotiable Instruments Law* (3d ed. 1920) 342, 343.

though the state's recent adoption of the N. I. L. might surely be treated as a legislative declaration of policy to unify the law of bills and notes, no case from any of the conflicting jurisdictions is noted in the opinion.

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In grateful contrast stands *Hurlburt v. Bradley* (1920, Conn.) 109 Atl. 171. The question there was whether an endorser discharged by failure to give him notice had power to incur a duty to pay by merely making a new promise ten years later. The court elucidates cogently, and approves in principle, the old minority Connecticut rule that without new consideration such a promise was ineffective. "But, however that may be, our decision is controlled by [N. I. L.] section [109] . . . In the language of the Kentucky court, when confronted with the same situation, we feel that the foregoing provision was intended 'to put in force in this state the rule that had theretofore been adopted in the majority of states.'" The statute puts the new duty on the ground of waiver. On this point the court's analysis is interesting. "The question is whether the new promise was made with intent to relinquish a known right, or in this case a known immunity arising from the laches of the holder. . . . It is sufficient that, knowing he was immune from liability . . . he nevertheless promised to pay."<sup>13a</sup> Slow it may be; still, the process of unification does go on.

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*Gilbert v. Rosen* (1920, App. Div.) 180 N. Y. Supp. 772, though a divided court there read the contract in favor of the plaintiff, suggests a possible escape for gentlemen caught short in such affairs as the recent Stutz Motors commotion. Suppose the buyer knows at the time of sale that not enough shares can be had from others than himself to fill the contract—does the transaction then offend against the statutes against speculative sales of futures? Or suppose, as in the instant case, the "buyer" himself before the delivery date buys up the only available shares—has he thereby excused the seller by himself rendering performance impossible?<sup>14</sup>

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And still we struggle, by resolution and by argument, to discover whether the war is over and how far. *United States v. McDonald* (March 2, 1920, E. D. N. Y.) 63 N. Y. L. J. 75 (Apr. 7, 1920) sheds light on one aspect of the question. An alien enemy arrested in January last on the charge of being a spy, sued out a writ of *habeas corpus*. But although "the offense of being a spy is not known to civil or

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<sup>13a</sup> The soundest explanation of the transaction is identical point for point with that of the effect of a new promise to pay a debt barred by limitation. See (1919) 28 YALE LAW JOURNAL, 817.

<sup>14</sup> Cf. *Patterson v. Meyerhofer* (1912) 204 N. Y. 96, 97 N. E. 472, where the defendant "buyer" who bought up the land agreed to be conveyed was held for damages.

statutory law, and is one of a purely military character, cognizable only in time of war," his petition was dismissed. *Ex parte Milligan* was distinguished, soundly enough, on the ground that the civil courts are not now (nor ever will be) open to try the prisoner for the offense for which he was arrested.

The daily papers bring the report that M. Caillaux of dubious fame, immediately on being convicted and sentenced for a quasi-treasonable offense, was set free.<sup>15</sup> The reason was that he had already spent in prison, awaiting trial, a term equal to his sentence. There is food for thought in that report, for bar, for bench and for legislature. It is no uncommon occurrence for a judge in this country to reduce the sentence he imposes by the time the prisoner has already been confined. But if that policy is sound—and it would seem to be—there is a corollary: *compensation* for the detention of an accused who is acquitted.<sup>16</sup> Surely if imprisonment before trial is punishment for the guilty man, it is punishment for the innocent, no less—and punishment which he has *not* earned.

There is further food, and also drink, for thought in *State v. Burcham* (1920, Wash.) 187 Pac. 352. The question there was whether certain bottles contained intoxicating liquor "other than beer." The jury in its deliberations dealt with the real evidence in the case (there were twenty-four pint bottles) by "ought-tastic inference"—to vary Professor Wigmore's scientific term<sup>17</sup> to fit the circumstance. The trial court denied a motion for a new trial on this ground, and the upper court "could not say he erred therein." The jury may, metaphysically, have abused their discretion in tasting to determine "whether it was whiskey"—no easy thing to determine, in these days, at times—when the only question was whether it was intoxicating liquor "other than beer." But moving for a new trial on the ground that the jury had by their too much tasting come under the influence of strong drink seems a rather damaging admission for counsel for the accused to make. However that may be, may one not suspect that applications for excuse from jury duty may be less frequent for a time, in Washington?

*Ellis v. Commonwealth* (1920, Ky.) 217 S. W. 368, teaches that whiskey, though it could lawfully be neither possessed nor sold, is still a subject of larceny. The "law's delay" once more; it took the court two pages to determine that *whiskey is a thing of value*. In these days! A Kentucky court, too.

<sup>15</sup> New York Times, Sunday, Apr. 25, 1920, p. 1.

<sup>16</sup> For European provisions on the point see Borchard, *State Indemnity for Errors of Criminal Justice*, Senate Doc. No. 974, 63d Congr. 3d Sess. See also Taft, *The Delays of the Law* (1908) 18 YALE LAW JOURNAL, 28.

<sup>17</sup> "Autoptic proference." See e. g. 2 Wigmore, *Evidence* (1904) secs. 1150-1152.